STATE OF MICHIGAN

IN THE SUPREME COURT

SHAKEETA SIMPSON, as Personal Representative of the ESTATE OF ANTAUN SIMPSON,

Plaintiff-Appellee,

and

SHAKEETA SIMPSON,

Plaintiff,

-vs-

ALEX PICKENS, JR., & ASSOCIATES, M.D., P.C., a Michigan Corporation, d/b/a PICKENS MEDICAL CENTER, BRIGHTMOOR GENERAL MEDICAL CENTER INCORPORATED., a Michigan Corporation, d/b/a BRIGHTMOOR-PICKENS MEDICAL CENTER, ALEX PICKENS JR., M.D., and LINDA S. HARTMAN, P.A.,

Defendants-Appellants.
_____/

Supreme Court Case No. 152036

Court of Appeals Case No. 320443

Wayne County Circuit Court Case No: 13-000307-NH

DEFENDANTS-APPELLANTS' REPLY

TANOURY, NAUTS, McKINNEY & GARBARINO, P.L.L.C.

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INTRODUCTION

Defendants filed the instant application, submitting that the Court of Appeals erroneously reversed the decision of the trial court, which granted summary disposition as to plaintiff's wrongful death claim. Plaintiff's wrongful death claim was brought on behalf of a nonviable fetus. Plaintiff asserted that she had previously been diagnosed with an incompetent cervix and that defendants were negligent in failing to place a cerclage, which plaintiff claims would have preserved the pregnancy.

It is defendants' position that the amendment to the wrongful death act to include "death as described in section 2922a [MCL 600.2922a]" incorporated all of MCL 600.2922a that served to define the deaths described therein, including the need for an affirmative or positive act, as this Court held in *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012). Thus, the trial court properly dismissed the wrongful death claim as plaintiff only alleged negligent "omissions" and the Court of Appeals erred in concluding otherwise.

In response, plaintiff argues that only the "type" of death referenced in MCL 600.2922a was incorporated into the wrongful death act, MCL 600.2922. That is, plaintiff argues that the "death as described in section 2922a" is a simply a miscarriage, stillbirth, or death of an embryo or fetus.

Defendants submit that plaintiff's position (accepted by the Court of Appeals) is in error and ignores the plain statutory language. The Court of Appeals' decision should be reversed and the dismissal entered by the trial court reinstated.

ARGUMENTS

I. The Legislature chose to use language that broadly incorporates MCL 600.2922a into MCL 600.2922.

Plaintiffs' central argument is that only the "type" death referenced in MCL 600.2922a was

incorporated into MCL 600.2922. Yet, plainly, MCL 600.2922 *does not* state that the "type" of death described in MCL 6002922a has been incorporated. Rather, the Legislature chose to use a broader phrase. Indeed, had the Legislature intended to incorporate only the "type" of death referenced in MCL 600.2922a, the Legislature could have amended MCL 600.2922 to read that an action could be brought for "the death of a person, injuries resulting in death, or a miscarriage, stillbirth, or the death of an embryo or fetus . . ." Or, that an action could be brought for "the death of a person, injuries resulting in death, or the type of death as described in section 2922a . . ." Yet the Legislature did not do so, instead stating that a wrongful death action could be brought for a "death as described in section 2922a", language specifically referring to a cause of action brought under MCL 600.2922a. Defendants submit that their interpretation of MCL 600.2922 (as currently phrased) gives meaning to both statutes while plaintiff's interpretation, and the Court of Appeals decision, does not.

II. The underlying cause of action relies on MCL 600.2922a.

In connection with this argument, one specific area in which the parties differ is whether the underlying cause of action is simply a medical malpractice action or a medical malpractice action relying on MCL 600.2922a. Defendants submit that the underlying claim is both a medical malpractice action and a claim brought pursuant to MCL 600.2922a. This is so because a potential cause of action in this case would not exist in any form but for MCL 600.2922a.

As plaintiff recounts in the "History" portion of her response (beginning at page 5), the case law in Michigan had developed to distinguish between the claimed wrongful death of a fetus pre- and post-viability, allowing a wrongful death cause of action for the latter but not the former. Thus, in *O'Neill v Morse*, 385 Mich 130; 188 NW2d 785 (1971), this Court recognized a wrongful death

cause of action for the death of an eight month old viable fetus. In contrast, the Court of Appeals in *Toth v Goree*, 65 Mich App 296; 237 NW2d 297 (1975) held that there was no cause of action for the claimed wrongful death of a nonviable three month old fetus. The Court stated that the creation of such a cause of action was best left to the Legislature:

> [T]he ruling by the *Roe* Court [*Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973)] that the attending physician in consultation with the patient may terminate the pregnancy in the first three months, free of interference by the state, is the crucial point. If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at that same stage. There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.
>
> Finally, the statute itself, M.C.L.A. s 600.2922; M.S.A. s 27A.2922, should not become the object of judicial legislation. If Michigan is to become the first jurisdiction to allow recovery under the wrongful death act on behalf of an unborn three-month-old nonviable fetus, it is a determination for the Legislature. [*Toth*, *supra*, 65 Mich App at 303-304, citation omitted.]

See also *McDowell v Stubbs*, 455 Mich 853; 564 NW2d 463 (1997) ("Since at least 1975 it has been held that a non-viable fetus is not a 'person' within the meaning of the Wrongful Death Act").

MCL 600.2922a, as enacted in 1998 and amended in 2000, was apparently an attempt to respond to such case law by providing a cause of action for the death of or injury to a pre-viable fetus, under certain circumstances defined within the statute itself. Subsequently, in 2005, the wrongful death act, MCL 600.2922, was amended (to its current form) to explicitly reference MCL 600.2922a. This amendment inserted in MCL 600.2922(1) the language "or death as described in

section 2922a" and, in subsection (2), changed the requirement that every action be brought in the name of the "deceased person" to instead require that every action be brought in the name of the "deceased."

Plaintiff focuses in her response on the phrase in MCL 600.2922 allowing a wrongful death claim to proceed where the death is "caused by wrongful act, neglect, or fault of another", arguing that such expands the claims that can be brought relative to the death of a nonviable fetus to include alleged negligent "omissions." However, plaintiff (and the Court of Appeals in its opinion), have ignored the remainder of the statutory language. Specifically, while a wrongful death action can be maintained under MCL 600.2922, based on the "wrongful act, neglect, or fault of another," the statute further requires that "the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages". Thus, a particular act, neglect, or fault can comprise the basis for a wrongful death action only if that act, neglect, or fault could be the basis for a cause of action if the decedent had lived.

Thus, MCL 600.2922 does not expand any cause of action that must be brought under the wrongful death act. The cause of action is the same regardless of whether a plaintiff proceeds solely under MCL 600.2922a or, where the claim involves an alleged wrongful death, pursuant to MCL 600.2922. As the history and case law relative to MCL 600.2922 and MCL 600.2922a demonstrates, there was no cause of action for the death of a nonviable fetus before MCL 600.2922a was enacted. Plaintiff asserts that "there is no construction of the wrongful death act that could ever negate the entirety of §2922a" (plaintiff's response, p 18). Thus, the cause of action created by MCL 600.2922a survives its incorporation into MCL 600.2922. In contrast, plaintiff's interpretation creates a two-tiered system, where a claim proceeding pursuant to MCL 600.2922a alone requires an affirmative

act, but where death results, a different standard applies, allowing recovery for affirmative acts and omissions.

This Court's decision in *Wesche v Mecosta County Road Commission*, 480 Mich 75; 746 NW2d 847 (2008) provides an analogous example. One issue in this case was whether the wrongful death act permitted a loss of consortium claim or whether governmental immunity barred such claims. The underlying cause of action relied on MCL 600.1405, which provides that:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

The *Wesche* decision consisted of two consolidated cases. In one of those cases (*Kik v Sbraccia*), the plaintiff, while pregnant, was being transported in an ambulance. The ambulance overturned in a ditch, allegedly resulting in premature labor and the death of the fetus. Thus, the *Kik* portion of the *Wesche* decision also involved a wrongful death claim.

In finding that the plaintiffs in *Kik* did not have a right to recover loss of consortium damages, this Court noted that, although the wrongful death act allows for a loss of consortium claim, the underlying cause of action does not. Thus, the underlying statutory provision that gave rise to the cause of action applied, even where the cause of action proceeded as a wrongful death claim:

> The wrongful-death act does not waive a governmental agency's immunity beyond the limits set forth in the underlying statutory exception. The three-judge panel in *Kik I* ruled that even if the motor-vehicle exception does not waive immunity, the wrongful-death act nonetheless allows a claim for loss of consortium. This conclusion contravenes both the language of the wrongful-death

act and this Court's caselaw.

* * *

> The *Kik I* panel reasoned that even if the motor-vehicle exception does not waive immunity, the wrongful-death act expressly authorizes damages for loss of society and companionship. But that analysis fails to give effect to language in MCL 600.2922(1) making liability contingent on whether the party injured would have been entitled to maintain an action and recover damages if death had not ensued. [*Wesche*, *supra*, 480 Mich at 87-88.]

So too, here, while plaintiff must proceed pursuant to the wrongful death act, liability is contingent on whether a cause of action can be maintained pursuant to MCL 600.2922a. While MCL 600.2922 allows recovery for the "wrongful act, neglect, or fault of another", MCL 600.2922a does not. To conclude that the restrictions in MCL 600.2922a do not apply in this case gives no effect to the language of MCL 600.2922 that makes liability contingent on the underlying cause of action.

III. The Court of Appeals' decision precludes application of the exceptions to recovery in MCL 600.2922a(2) to a wrongful death action.

In granting leave to appeal in *Johnson v Pastoriza*, *supra*, this Court asked the parties to address whether the amendment to the wrongful death act to reference "death as described in section 2922a" incorporated the exceptions to recovery contained in MCL 600.2922a(2). See 491 Mich at 420 n 1. However, given the disposition of that case, this Court found it unnecessary to address the issue. *Id*.

Defendants addressed this issue in their application for leave to appeal, noting that the Court of Appeals decision has answered this question in the negative. That is, by concluding that, other than "the death of an embryo or fetus", no other portion of MCL 600.2922a was incorporated into the wrongful death act, the Court of Appeals concluded that the exceptions to recovery in MCL

600.2922a(2) were not incorporated.

Plaintiff, in her response to the application, does not contend otherwise. Rather, plaintiff simply states that these concerns should be addressed to the Legislature.

Yet, accepting plaintiff's contention that MCL 600.2922a remains as a stand-alone statute, the result here, again, is a two-tiered system. The exceptions to recovery would apply where a plaintiff proceeds solely under MCL 600.2922a. However, where the claim must proceed as a wrongful death action, the immunity protections in subsection (2) no longer apply. This result is inconsistent with this Court's pronouncements that the wrongful death act is merely a "filter" through which the underlying cause of action must proceed. See *Wesche*, *supra* and *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982).

IV. Conclusion.

The Court of Appeals erred in concluding that only the "type" of death referenced in MCL 600.2922a was incorporated into the wrongful death act. As set forth more fully in defendants' application for leave to appeal, the phrase "death as described in section 2922a" evidences an intent to incorporate the terms, conditions, and limitations of MCL 600.2922a that serve to define the "deaths" described therein. To conclude otherwise creates a two-tiered system where different standards and exceptions to liability apply depending on whether a plaintiff proceeds pursuant to MCL 600.2922a alone or pursuant to MCL 600.2922 as a wrongful death claim.

The Court of Appeals' decision should be reversed and the trial court's order dismissing the wrongful death claim should be reinstated.

RELIEF REQUESTED

WHEREFORE, defendants-appellants respectfully request that this Honorable Court peremptorily reverse the Court of Appeals' June 16, 2015 opinion and reinstate the trial court's order granting defendants' motion for partial summary disposition and dismissing the wrongful death claim. In the alternative, defendants request that this Court grant their application for leave to appeal. Defendants request costs and attorney fees.

Respectfully submitted,

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BY: */s/Anita Comorski*

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